2009

State of Utah v. John Vernon Cecil : Brief of Appellee

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jeanne B. Inouye; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Zachary J. Weiland; Washington County Attorney's Office; Counsel for Appellee.

Gary G. Kuhlmann; Nicolas D. Turner; Gary G. Kuhlmann and Associates, PC; Counsel for Appellant.

Case No. 20100003-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

John Vernon Cecil,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for aggravated assault, criminal mischief, and reckless driving, in the Fifth Judicial District Court of Utah, Washington County, the Honorable G. Rand Beacham presiding.

JEANNE B. INOUYE (1618)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

ZACHARY J. WEILAND
Washington County Attorney's Office

Counsel for Appellee

GARY G. KUHLMANN
NICOLAS D. TURNER
Gary G. Kuhlmann & Asociates, PC
107 South 1470 East, Suite 105
St. George, UT 84790

Counsel for Appellant

NO ORAL ARGUMENT REQUESTED

Case No. 20100003-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

John Vernon Cecil,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for aggravated assault, criminal mischief, and reckless driving, in the Fifth Judicial District Court of Utah, Washington County, the Honorable G. Rand Beacham presiding.

JEANNE B. INOUYE (1618)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

ZACHARY J. WEILAND
Washington County Attorney's Office

Counsel for Appellee

GARY G. KUHLMANN
NICOLAS D. TURNER
Gary G. Kuhlmann & Asociates, PC
107 South 1470 East, Suite 105
St. George, UT 84790

Counsel for Appellant

NO ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

Case No. 20100003-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

John Vernon Cecil,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-102 & 103 (West 2004): criminal mischief, a third degree felony in violation of Utah Code Ann. § 76-6-106 (West Supp. 2008); and and reckless driving, a class B misdemeanor in violation of Utah Code Ann. § 41-6a-528 (West Supp. 2008) This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUES

Defendant raises seven claims in his brief. Defendant's appellate counsel designates the first two claims [claims IA and IB] as "claims which counsel believes have merit." Br. Appellant at 17 (boldface, capitalization, and underlining omitted). These claims both address the sufficiency of the evidence on the criminal mischief charge.

Defendant designates the next five claims [claims IIA through IIE] as "claims raised by the defendant." *Id.* at 20 (boldface, capitalization, and underlining omitted). Counsel argues that claims IIA and IIC lack merit and addresses them as he would in an *Anders* brief. *Id.* at 17, 20-21, 25-26; *see also Anders v. California*, 386 U.S. 738 (1967). Counsel argues that Defendant's remaining five claims – IA, IB, IIB, IID, and IIE – may have merit, but he does not adequately brief any of them.

1. Did the trial court correctly deny Defendant's motion to dismiss the criminal mischief charge, where the State presented evidence that Defendant intended to hit and damage both the victim and the property shielding him?

Standard of Review. "The grant or denial of a motion to dismiss is a question of law," reviewed "for correctness." *State v. Hamilton*, 2003 UT 22, ¶ 17, 70 P.3d 111 (citations and internal quotation omitted).

2. Was the evidence sufficient to support the jury's guilty verdict on the criminal mischief charge, where the evidence supported a finding that Defendant intended to hit and damage both the victim and the property shielding him?

Standard of Review. "The standard of review for a sufficiency claim is highly deferential to a jury verdict." *State v. Workman*, 2005 UT 66, ¶ 29, 122 P.3d 639. In reviewing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the jury's verdict and will reverse only if the Court determines

that "reasonable minds could not have reached the verdict." *See id.* (internal quotation marks omitted).

3. Should this Court review the five claims designated as "Defendant's claims," where appellate counsel either concedes they are meritless or inadequately briefs them?

Standard of Review. No standard of review applies to this question.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statutes are included in the Addendum:

Utah Code Ann. § 76-2-105 (West 2004) (transferred intent);
Utah Code Ann. § 76-5-102 (West 2004) (assault);
Utah Code Ann. § 76-5-103 (West 2004) (aggravated assault);
Utah Code Ann. § 76-6-106 (West Supp. 2008) (criminal mischief).

STATEMENT OF THE CASE

A. Summary of the facts.

1. The prosecution's version.

a. The first assault.

On March 30, 2009, Michael Paul Stevens was driving a 1992 Chevrolet Blazer in Washington City. R112:177, 182. He was also talking on his cell phone. R112:178. When he dropped the phone, he pulled off to the right side of the road to pick it up. *Id.* As he began to talk on the phone again, he looked up to see Defendant and Anjelica Quintero accelerating toward him in Anjelica's late 1970's blue Chevrolet truck. *Id.* Anjelica was Stevens' former girlfriend, and he recognized the truck. *Id.*

at 179. Stevens sped off. *Id.* Defendant, who was driving, caught up with Stevens and passed him. *Id.* at 181. Stevens slowed down. *Id.* Defendant "screeched on the brakes, came to a stop and then put [the truck] in reverse." *Id.* Defendant then sped backwards trying to hit Stevens. *Id.* Stevens maneuvered out of the way and proceeded down the street. *Id.* at 181-82.

b. The second assault.

Stevens traveled to a nearby Chevron station where his former step-brother operated a repair business called Lug Nuts. *Id.* at 182, 185, 298. Stevens parked his car near a car hoist. *Id.* Defendant and Anjelica followed him. *Id.* at 183. Defendant stopped the blue truck about ten or fifteen feet from Stevens. *Id.* at 184. Stevens got out of the Blazer, stood behind the hoist, and put up his hands to signal "What's going on?" *Id.* at 183-85. Defendant "then stepped on the gas and just came full speed and crashed right into . . . the car hoist." *Id.* at 184. If the hoist had not been there, Stevens would have been hit. *Id.* at 185. Defendant "backed up and then sped off down the street." *Id.*

Stephens' former step-brother, Todd Evans, heard the crash and came out to see what was happening. *Id.* at 185. Defendant told him to call the police, "that this guy just tried to run me over and hit the hoist." *Id.* at 186.

c. The third assault

As Todd was on the phone with dispatch, Defendant suddenly returned. *Id.* at 187. Defendant drove the truck back around the corner and "bolted right into the gas station . . . like he was trying to hit [Stevens]." *Id.* at 187. Stevens heard the truck accelerating towards him. *Id.* He had "enough time to just brace [himself] on the front of the truck and use that to push [himself] away." *Id.* at 187-88. And then Defendant left. *Id.* at 188.

2. Defendant's version.

Defendant did not testify. R46. His version of the events was presented through the testimony of investigating officer Christopher Ray. *See* R112:289-331. Defendant and Anjelica also called dispatch on the day of the incident, and Officer Ray met with them at Anjelica's apartment in response to their call. *See id.* at 291-93

Defendant told Officer Ray that as he and Anjelica drove into Washington City, they saw Stevens' car at the Chevron. *Id.* at 294. They did not want Stevens to know where they lived because of "some threats that had been made recently." *Id.* So they drove around, hoping Stevens would leave the area. *Id.* When some time had passed, they approached Anjelica's neighborhood. *Id.* at 295. They saw Stevens parked near the entrance to her complex. *Id.* So they continued driving back toward the Chevron station, passing Stevens on the way. *Id.* Defendant and Anjelica told the officer that Stevens began to chase them. *Id.* at 296. They said

Stevens chased them around the pumps and along the back side of the station. *Id.* They said Stevens pulled in front of them, exited his car, and began to approach them in an aggressive manner. *Id.* at 297. Both could see a black semi-automatic handgun stuck through the front waistband of Stevens' pants. *Id.*

Officer Ray left Defendant and Anjelica to fill out their written statements. *Id.* at 298. He then responded to Todd's call to dispatch, traveling to the Chevron station to get Todd's and Stevens' side of the story. *Id.* at 298-300. After talking to them, Officer Ray returned to Anjelica's home. *Id.* at 311.

Defendant and Anjelica had prepared their written statements. *Id.* at 311. Their statements told a story different from the verbal accounts they had earlier given Officer Ray. *Id.* at 313. In their written accounts, they no longer said that Stevens had chased them. *Id.* Rather, they said that they had followed Stevens to get his license plate number. *Id.* Officer Ray asked Defendant why he had not told him about hitting the hoist. *Id.* at 314. Defendant said that he had forgotten. *Id.* Defendant also admitted that he had tried to hit Stevens two different times, stating that he felt "threatened by Mr. Stevens because of the threats made in the past" and that therefore he "was in fear for [his] life." *Id.* at 314-15. Defendant claimed that when Stevens exited the car, Defendant saw that Stevens had a handgun, feared for his own life, and tried to hit Stevens. *Id.* at 315. Asked why he had not mentioned the gun in his call to dispatch, Defendant blamed the dispatcher, saying that the

dispatcher would not give him time to explain. *Id.* at 316. Asked about passing Stevens and slamming on his brakes, Defendant admitted to that, but again claimed that he "was in fear for [his] life, . . . protecting [himself]." *Id.*

3. Todd Evans' account.

Todd Evans, Stevens' step-brother, testified that he was working that day, heard a loud bang, and walked out to see Stevens standing near the hoist and the blue truck backing up. *Id.* at 236-37. Stevens told Todd to call 911 and said "[t]hey just hit your hoist." *Id.* at 237. While trying to call 911, Todd heard an engine roar, saw a blue truck entering the property, heard Defendant "revving [the] engine as hard as [Todd] could imagine it being revved." *Id.* at 240-41. He then saw Defendant crank the wheel hard to the left, saw "intense anger" in Defendant's face, and saw Defendant as he passed very closely and sped toward Stevens, revving the engine and driving so close that Stevens had to shove himself off the blue truck. *Id.* at 241-43.

4. Anjelica Quintero's account.

Anjelica testified that she and Defendant were coming home when they saw Stevens. *Id.* at 341. Defendant followed Stevens, veered in front of him, slammed on the breaks, and started driving backwards as if to hit Stevens' Blazer. *Id.* at 342. Defendant and Anjelica then followed Stevens to the Chevron station. *Id.* at 343. When Stevens parked behind the station and exited his car, Defendant "floored it

and tried to hit him." *Id.* Stevens jumped out of the way, and they slammed into the lift. *Id.* Stevens had no gun. *Id.*

Anjelica testified that she had lied in her written statement because Defendant "wanted our testimonies on our statements to match, and . . . he had me, word for word, write what he wanted on the statement." *Id.*

B. Summary of the proceedings.

The State charged Defendant with two counts of aggravated assault and one count each of criminal mischief, reckless driving, and failure to stop at the scene of an accident involving property damage. R25-26 (amended information); *see also* R27.

After the State rested at trial, Defendant moved to dismiss all the charges. R112:379. The court dismissed the charge for failure to stop at the scene of an accident. R46-47; R113:431. The court denied Defendant's motion to dismiss the other charges. R112:379-392; R113:431. The jury found Defendant guilty of one count each of aggravated assault, criminal mischief, and reckless driving. R45. The jury found Defendant not guilty on the second count of aggravated assault. *Id.*

The trial court sentenced Defendant to five-years-to-life prison terms on his convictions for aggravated assault and criminal mischief and to a six-month jail term on his reckless driving conviction. R93-94. The court ordered that Defendant's

sentence on the aggravated assault conviction run consecutively to his other sentences. *Id.*

Defendant timely appealed. R106.

SUMMARY OF ARGUMENT

Defendant presents two claims designated "the defendant's claims which counsel believes have merit." Defendant claims that the trial court erred by denying his motion to dismiss the criminal mischief charge at the close of the State's case. He also claims that the evidence is insufficient to support the jury's guilty verdict on that charge. Defendant cannot prevail on these claims. The State's evidence included testimony that Defendant chased Michael Stevens into the Chevron station lot and followed him to the back of the station. When Stevens got out of his vehicle and stood behind a car hoist, Defendant stepped on the gas and crashed full speed into the car hoist. This evidence and the reasonable inferences that can be drawn from it suffice to support a jury finding that Defendant intended to hit the hoist and therefore justify the court's denial of Defendant's motion to dismiss.

Defendant presents five other issues designated "the claims raised by the defendant." Counsel treats two of these claims as *Anders* claims, conceding they lack merit and explaining why. The State concurs in counsel's analysis that the claims lack merit.

Defendant suggests that the other three claims may have merit, but does not adequately brief them. This Court should therefore deny review of those claims.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO DISMISS THE CRIMINAL MISCHIEF CHARGE

(response to Defendant's claim IA)

Defendant first claims that the "trial court erred in denying [his] motion to dismiss the charge of criminal mischief." Br. Appellant at 17 (boldface and underlining omitted). Defendant asserts that the State presented no evidence that he "intentionally damaged, defaced, or destroyed the hoist." *Id.* at 18 (internal quotation marks omitted). He claims that the evidence showed only that he "attempted to hit Mr. Stevens with a vehicle and missed and hit the hoist." *Id.* Defendant cannot prevail on this claim because his intent to hit the hoist can be reasonably inferred from his actions and the surrounding circumstances.

Background. In arguing his motion to dismiss below, Defendant claimed that the State had to prove that he intentionally damaged the hoist. R112:384. He claimed below, as he now claims on appeal, that there was testimony that Defendant intended to hit Stevens, but not that he intended to hit the hoist. *Id.* The trial court denied the motion, holding there was sufficient evidence of intent. *Id.* at 387.

Relevant law. A defendant's motion to dismiss for insufficient evidence at the conclusion of the State's case-in-chief requires the trial court to determine whether the prosecution presented sufficient evidence of each element of the offense. *See State v. Spainhower*, 1999 UT App 280, ¶ 4, 988 P.2d 452. "Evidence is sufficient, and the denial of a motion to dismiss proper, if 'the evidence and all inferences that can be reasonably drawn from it [establish that] some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *See id.* (quoting *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989) (alterations in *Spainhower*)).

Defendant challenged the sufficiency of the evidence to support a jury's finding that he committed criminal mischief. A person commits criminal mischief where he "intentionally damages, defaces, or destroys the property of another." Utah Code Ann. § 76-6-106(2)(c). Thus, to prevail on his motion to dismiss, Defendant was required to show that there was no basis in the evidence from which a reasonable jury could find that he intentionally damaged or destroyed the hoist.

Because this is a "fact-sensitive" question, challenging the trial court's ruling requires that Defendant marshal the evidence that supports it. *See State v. Chavez-Espinoza*, 2008 UT App 191, ¶ 20, 186 P.3d 1023 ("In order to challenge a jury verdict or denial of a motion to dismiss, the challenging party must marshal the evidence in support of the jury's verdict and the trial court's findings."); *see also Kimball v.*

Kimball, 2009 UT App 233, ¶ 22, 217 P.3d 733 ("'Even where [a defendant] purport[s] to challenge only the legal ruling, as here, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendant[] also ha[s] a duty to marshal the evidence.") (citation omitted).

A. This Court should not review Defendant's claim because he has not marshaled the evidence.

Defendant has not met his marshaling burden. Defendant claims summarily that the "plaintiff's evidence was limited to the alleged fact that the defendant attempted to hit Mr. Stevens with a vehicle and missed and hit the hoist." Br. Appellant at 18. He cites only to R112:384-388, which is trial counsel's argument on the issue.

This does not suffice. The marshaled evidence includes testimony that Defendant aimed at Stevens, who stood behind the hoist, and sped into the hoist. *See* R112:184. Stevens testified that he got out of his car and stood "right behind" the hoist. R112:185. He testified that while he was standing there, Defendant "stepped on the gas and just came full speed and crashed right into . . . the car hoist." R112:184.

This is not testimony that Defendant missed Stevens and accidentally hit the hoist. This is evidence that Defendant intentionally hit the hoist in an attempt to reach and hit Stevens. Defendant was required to marshal this evidence, but did not. This Court should deny Defendant's claim for this reason alone.

B. The State presented some evidence from which a reasonable jury could find that Defendant intentionally damaged or destroyed the hoist.

Even if this Court excuses Defendant's marshaling failure, the trial court properly denied the motion to dismiss the criminal mischief charge. As explained, the State presented Stevens' testimony that as he stood behind the hoist, Defendant stepped on the gas and crashed into the hoist. *See id.* This is evidence from which the jury could reasonably infer that Defendant intended to hit the hoist. "'[T]he intent to commit [an offense] is a state of mind, which is rarely susceptible of direct proof, . . . can be inferred from conduct and attendant circumstances in the light of human behavior and experience.'" *State v. Robertson*, 2005 UT App 419, 122 P.3d 895 (quoting *State v. Brooks*, 631 P.2d 878, 888 (Utah 1981)); *see also State v. Colwell*, 2000 UT 8, ¶ 43, 994 P.2d 177.

Defendant admitted that he intended to hit Stevens. *See* R112:314-15. The jury could have inferred from that admission and from testimony about Defendant's conduct that Defendant also intended to hit the hoist in order to reach Stevens. The prosecution, in fact, argued this inference to the trial court. *See* R112:386-87. The trial court found that the evidence sufficed to support a jury's finding on the basis that Defendant intended to damage the hoist. *See id.* at 387.

Defendant ignores that ruling and its analytical basis. He claims that he "inadvertently hit the hoist." Br. Appellant at 20. The State's evidence provided a

basis for a jury to find beyond a reasonable doubt that Defendant did intend to hit the hoist. This Court should therefore affirm the trial court's ruling denying Defendant's motion to dismiss.[1]

Defendant also argues that the "transferred intent" statute does not apply. *Id.* at 18; *see also* Utah Code Ann. § 76-2-105. He claims that the intent to hit Stevens cannot be transferred to establish intent to hit the hoist. Br. Appellant at 18, 20. He argues that the intent to hit a person may be transferred only to establish intent to hit another person, not to establish intent to hit or damage property. *Id.*

This is a red herring. The State does not argue that Defendant's intent to hit Stevens established the intent to hit the hoist. Nor did the prosecutor below. The

---

[1] Defendant's motivation may not have been to damage or destroy the hoist. His motivation may have simply been to reach and hit Stevens. But the criminal mischief statute does not require the State to prove motivation. Rather, it requires the State to prove intent. And the State presented evidence from which the jury could reasonably have inferred that Defendant intended to hit the hoist in order to reach and hit Stevens.

prosecutor below argued, as the State does now, that Defendant intended to hit the hoist in order to reach Stevens. *See* R112:386.[2]

II.

THE EVIDENCE SUFFICED TO SUPPORT THE JURY'S FINDING DEFENDANT GUILTY OF CRIMINAL MISCHIEF

(response to Defendant's claim IB)

Defendant next claims that the evidence was insufficient to "support the jury's verdict finding the defendant guilty of the charge of criminal mischief." Br. Appellant at 19 (boldface and underlining omitted). Where the defense presented no testimony, this claim simply replicates Defendant's claim regarding the insufficiency of the evidence to withstand the motion to dismiss addressed in Point I. Defendant cannot prevail on this claim because, as demonstrated, the evidence was not so inconclusive that a reasonable jury must have entertained a doubt that Defendant committed criminal mischief.

---

[2] The prosecutor did reference the transferred intent statute, Utah Code Ann. § 76-2-105, during his argument on the motion to dismiss. *See* R112:381-82. The prosecutor argued that Defendant's intent to hit Stevens could be transferred to establish intent to hit Stevens' step-brother, Todd Evans, and therefore to establish intent for purposes of the second aggravated assault count. *See* R112:381-83. That count was based on Defendant's narrowly missing Evans when he returned to the Chevron station and admittedly tried to hit Stevens with his truck. *See* R77.

A. This Court should not review Defendant's claim because he has not marshaled the evidence.

Here again, Defendant has not marshaled the evidence. Because a claim that the evidence is insufficient to support a verdict challenges a jury's factual finding, an appellant making the claim "must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in a light most favorable to the verdict." *State v. White*, 2011 UT App 162, ¶ 7, 258 P.3d 594 (citations and internal quotation marks omitted).

Defendant's two paragraph argument does not cite to the record let alone marshal the evidence supporting the jury's verdict. Again, Defendant does not marshal Stevens' critical testimony that as he stood behind the hoist, Defendant aimed the truck at him and crashed into the hoist. *Compare* Br. Appellant at 19-20 *with* R112:184-85.

B. The evidence sufficed to support the jury's verdict of guilty on the criminal mischief count.

Moreover, Defendant cannot prevail on the merits. "The standard of review for a sufficiency claim is highly deferential to a jury verdict." *Workman*, 2005 UT 66, ¶ 29. In reviewing the sufficiency of the evidence, the Court must view the evidence in the light most favorable to the jury verdict. *See id.* The Court will reverse the jury's decision only if it determines "that reasonable minds could not have reached the verdict." *See id.* (internal quotation marks omitted).

As explained, Stevens testified that Defendant tried to hit him with the blue truck as Stevens stood behind the hoist. R112:183-85. Based on this conduct, the jury could have reasonably found that Defendant intended to hit the hoist in order to reach Stevens.

III.

THIS COURT NEED NOT ADDRESS THE ISSUES DESIGNATED AS "CLAIMS RAISED BY THE DEFENDANT"; APPELLATE COUNSEL EITHER CONCEDES THAT THE CLAIMS ARE MERITLESS OR INADEQUATELY BRIEFS THEM.

(response to Defendant's claim IIA to IIE)

A. As appellate counsel concedes, Defendant was not entitled to a mistrial after a juror saw him briefly in the hallway at a time when he was wearing handcuffs.

Defendant requested a mistrial below because a juror inadvertently saw him in the hallway at a time when he was wearing handcuffs. *See* R112:271. The trial court called the juror into chambers and questioned her about the incident. R112:281. She testified that the bailiff opened the door into the hallway, she saw Defendant, and she just put her head down and did not make eye contact. *Id.* at 282. Asked about the incident, she said that nothing was said and the incident caused her no concerns. *Id.* The trial court denied Defendant's motion for a mistrial. *Id.*

Appellate counsel concedes that Defendant was not entitled to a new trial because he suffered no prejudice. *See* Br. Appellant at 20-21 (citing *State v. Wetzel*, 868 P.2d 64, 70 (Utah 1993) (brief and fortuitous encounter of the defendant in

handcuffs outside the courtroom does not dilute presumption of innocence and does not require reversal absent evidence of actual prejudice)). Defense counsel concedes that the record lacks evidence showing actual prejudice. *Id.* at 21.

The State concurs in counsel's analysis.

B. Counsel has not adequately briefed Defendant's claim that the trial court erred in refusing to admit evidence of past convictions, currently pending charges, etc., to impeach the testimony of a prosecution witness.

Appellate counsel has not adequately briefed Defendant's claim that the trial court erred in excluding evidence of past convictions, currently pending charges, and an ex parte stalking order against Stevens. Accordingly, this Court should not address it.

An "appellate court is not 'a depository in which [a party] may dump the burden of argument and research.'" *Allen v. Friel*, 2008 UT 56, ¶ 9, 194 P.3d 903 (citation omitted). When a party does nothing more than "cursorily" raise an issue, this Court should "decline[ ] to address" it on appeal. *State v. Arave*, 2009 UT App 278, ¶ 12 n.3, 220 P.3d 182, *cert. granted*, 225 P.3d 880 (Utah 2010); *see also State v. Green*, 2005 UT 9, ¶ 11, 108 P.3d 710 ("A brief which does not fully identify, analyze, and cite its legal arguments may be disregarded or stricken by the court.").

Here, appellate counsel has not identified the evidence Defendant asked to introduce, nor has he addressed the trial court's reasoning. *See* Br. Appellant at 21-25. He has not addressed the trial court's ruling that much of the evidence he

sought to introduce was irrelevant or at least more prejudicial than probative. *See id.*; R.112:192, 198, 199, 200, 202, 206, 212-14. He has not attempted to explain why the trial court's ruling on those matters was improper. *See id.* Moreover, he has not addressed the parts of the evidence that the court agreed could be admitted because they were probative and not unfairly prejudicial. *See id.*; *see also* R112:200, 207, 208. And he has not tried to explain why the portions of the evidence admitted were insufficient to adequately impeach Stevens. *See id.*

Rather, Defendant has "dump[ed] the burden of argument and research" on this Court and opposing counsel. *Allen*, 2008 UT 56, ¶ 9. Because Defendant's claim is inadequately briefed, this Court should not address it.

C. As appellate counsel concedes, the trial court correctly overruled Defendant's objection to jury instructions 11 and 12.

Defendant objected below to jury instructions 11 and 12. R112:355, 363. He claimed that the instructions incorrectly permitted the jury to find him guilty of aggravated assault on the basis of an intentional, knowing, or reckless mental state. *See id.* at 356-60. He argued that aggravated assault required an intentional mental state. *See id.*

Appellate counsel concedes that the trial judge was correct in overruling the objection. *See* Br. Appellant at 25-26. He cites *In re McElhaney*, 579 P.2d 328 (Utah 1978), for its holding that "intent, knowledge, or recklessness shall suffice to establish criminal liability" for the dangerous weapon version of aggravated assault.

Id. at 26. That case follows the relevant statutes. *See* Utah Code Ann. § 76-5-102 & 103. Thus, the challenged instructions are correct.

The State concurs in counsel's analysis.

D. Counsel has not adequately briefed Defendant's claim that the trial counsel was ineffective for not interviewing or subpoenaing certain witnesses and for not acquiring certain tape recordings.

Defendant claims that trial counsel was ineffective for not interviewing or subpoenaing certain witnesses allegedly identified by Defendant and for not acquiring and offering into evidence certain alleged tape recordings of conversations between [him] and the alleged victim. *See* Br. Appellant at 27-29.

Defendant has not adequately briefed this argument. Other than setting forth the law regarding ineffective assistance of counsel—that a defendant must demonstrate deficient performance and prejudice—Defendant has not cited any authority to support his claim. Moreover, he has not once cited to the record below or to any evidence that trial counsel knew or should have known about such witnesses or tapes. Even on appeal, he has not identified what witnesses should have been called, what they might have testified, and how that testimony would have made a difference in his case. Nor has he explained what tapes he is talking about, what evidence they contained, or how the tapes would have made a difference in the outcome. Defendant merely speculates that "[h]ad trial counsel obtained and evaluated the recordings, and had the recordings contained

exculpatory evidence or evidence supporting [his] self defense claim," such evidence could have been presented to the jury. Br. Appellant at 29.

Defendant's claim is speculative, without record support, and inadequately briefed. This Court should not review it.

E. Counsel has not adequately briefed Defendant's claim that the prosecution willfully withheld certain exculpatory tape recordings.

Defendant claims that the "prosecution willfully withheld certain tape recordings of conversations between the defendant and the alleged victim which would have been exculpatory of the defendant's actions or beneficial to the defendant's defense." Br. Appellant at 29 (boldface and underlining omitted).

Defendant again has not complied with the briefing requirements. While Defendant sets forth some law regarding the prosecutor's duty to disclose exculpatory evidence, he never identifies what evidence the prosecutor did not disclose, what that evidence would have shown, or why it might have been exculpatory. *See* Br. Appellant at 29-32. Because this claim is also speculative, without support in the record, and inadequately briefed, this Court should not review it.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted November 22, 2011.

MARK L. SHURTLEFF
Utah Attorney General

JEANNE B. INOUYE
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on November 22, 2011, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

Gary G. Kuhlmann
Nicolas D. Turner
Gary G. Kuhlmann & Asociates, PC
107 South 1470 East, Suite 105
St. George, UT 84790

A digital copy of the brief was also included: ☒ Yes ☐ No

Melissa Tryer

Addendum

<< Previous Section (76-2-104) Next Section (76-2-201) >>

Utah Code
Title 76 Utah Criminal Code
Chapter 2 Principles of Criminal Responsibility
Section 105 Transferred intent.

76-2-105. Transferred intent.

Where intentionally causing a result is an element of an offense, that element is established even if a different person than the actor intended was killed, injured, or harmed, or different property than the actor intended was damaged or otherwise affected.

Enacted by Chapter 199, 2004 General Session
Download Code Section Zipped WordPerfect 76_02_010500.ZIP 1,575 Bytes

<< Previous Section (76-2-104) Next Section (76-2-201) >>

<< Previous Section (76-5-101) Next Section (76-5-102.3) >>

Utah Code
Title 76 Utah Criminal Code
Chapter 5 Offenses Against the Person
Section 102 Assault.

76-5-102. Assault.

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; or

(b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

Amended by Chapter 109, 2003 General Session
Download Code Section Zipped WordPerfect 76_05_010200.ZIP 1,836 Bytes

<< Previous Section (76-5-101) Next Section (76-5-102.3) >>

(a) "Emergency medical service worker" means a person certified under Section 26–8a–302.

(b) "Health care provider" has the meaning as provided in Section 78–14–3.

Laws 1997, c. 4, § 1, eff. May 5, 1997; Laws 1999, c. 141, § 56, eff. Oct. 1, 1999.

Library References

Assault and Battery ⇐48 to 53.
Westlaw Key Number Searches: 37k48 to 37k53.

C.J.S. Assault and Battery §§ 2 to 3, 62, 64 to 70, 81.

§ 76–5–102.8. Disarming a peace officer

A person is guilty of a first degree felony who intentionally takes or removes, or attempts to take or remove, a firearm from the person or immediate presence of a person he knows is a peace officer:

(1) without the consent of the peace officer; and

(2) while the peace officer is acting within the scope of his authority as a peace officer.

Laws 1999, c. 274, § 1, eff. May 3, 1999.

Cross References

Attempt, elements and classification, see §§ 76–4–101 and 76–4–102.
Conspiracy and solicitation, elements and penalties, see § 76–4–201 et seq.
Fines upon conviction of misdemeanor or felony, see § 76–3–301.
Inchoate offenses, limitations on sentencing, see §§ 76–4–301 and 76–4–302.
Indigent Defense Act, see § 77–32–101 et seq.
Penalties for felonies, see § 76–3–203.
Rights of Crime Victims Act, see § 77–38–1 et seq.
Right to trial by jury, see Const. Art. 1, § 10.

Library References

Obstructing Justice ⇐3, 7.
Westlaw Key Number Searches: 282k3; 282k7.

C.J.S. Obstructing Justice or Governmental Administration §§ 4, 10, 12 to 29, 31, 32, 38.

§ 76–5–103. Aggravated assault

(1) A person commits aggravated assault if he commits assault as defined in Section 76–5–102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76–1–601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

Laws 1973, c. 196, § 76–5–103; Laws 1974, c. 32, § 10; Laws 1989, c. 170, § 2; Laws 1995, c. 291, § 5, eff. May 1, 1995.

U.C.A. 1953 § 76-6-106

West's Utah Code Annotated Currentness
Title 76. Utah Criminal Code
Chapter 6. Offenses Against Property
Part 1. Property Destruction

§ 76-6-106. Criminal mischief

(1) As used in this section, "critical infrastructure" includes:

(a) information and communication systems;
(b) financial and banking systems;
(c) transportation systems;
(d) any public utility service, including the power, energy, and water supply systems;
(e) sewage and water treatment systems;
(f) health care facilities as listed in Section 26-21-2, and emergency fire, medical, and law enforcement response systems;
(g) public health facilities and systems;
(h) food distribution systems; and
(i) other government operations and services.

(2) A person commits criminal mischief if the person:

(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;
(b) intentionally and unlawfully tampers with the property of another and as a result:
(i) recklessly endangers:
(A) human life; or
(B) human health or safety; or
(ii) recklessly causes or threatens a substantial interruption or impairment of any critical infrastructure;
(c) intentionally damages, defaces, or destroys the property of another; or
(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

(3)(a)(i) A violation of Subsection (2)(a) is a third degree felony.

(ii) A violation of Subsection (2)(b)(i)(A) is a class A misdemeanor.
(iii) A violation of Subsection (2)(b)(i)(B) is a class B misdemeanor.
(iv) A violation of Subsection (2)(b)(ii) is a second degree felony.
(b) Any other violation of this section is a:
(i) second degree felony if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $5,000 in value;
(ii) third degree felony if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $1,000 but is less than $5,000 in value;
(iii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of $300 but is less than $1,000 in value; and
(iv) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss less than $300 in value.

(4) In determining the value of damages under this section, or for computer crimes under Section 76-6-703, the value of any item, computer, computer network, computer property, computer services, software, or data includes the measurable value of the loss of use of the items and the measurable cost to replace or restore the items.

(5) In addition to any other penalty authorized by law, a court shall order any person convicted of any violation of this section to reimburse any federal, state, or local unit of government, or any private business, organization, individual, or entity for all expenses incurred in responding to a violation of Subsection (2)(b)(ii), unless the court states on the record the reasons why

the reimbursement would be inappropriate.

CREDIT(S)
Laws 1973, c. 196, § 76-6-106; Laws 1992, c. 14, § 1; Laws 1995, c. 291, § 11, eff. May 1, 1995; Laws 1996, c. 142, § 1, eff. April 29, 1996; Laws 1997, c. 300, § 1, eff. May 5, 1997; Laws 1998, c. 25, § 1, eff. May 4, 1998; Laws 1999, c. 31, § 1, eff. May 3, 1999; Laws 2002, c. 166, § 6, eff. May 6, 2002.

HISTORICAL AND STATUTORY NOTES

Laws 2002, c. 166, rewrote this section that formerly provided:

"(1) A person commits criminal mischief if the person:

"(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;

"(b) intentionally and unlawfully tampers with the property of another and as a result:

"(i) recklessly endangers:

"(A) human life; or

"(B) human health or safety; or

"(ii) recklessly causes or threatens a substantial interruption or impairment of:

"(A) any public utility service; or

"(B) any service or facility that provides communication with any public, private, or volunteer entity whose purpose is to respond to fire, police, or medical emergencies;

"(c) intentionally damages, defaces, or destroys the property of another; or

"(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

"(2)(a) A violation of Subsection (1)(a) is a felony of the third degree.

"(b) A violation of Subsection (1)(b) is a class A misdemeanor, except that a violation of Subsection (1)(b)(i)(B) is a class B misdemeanor.

"(c) Any other violation of this section is a: